STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

ALLIED VENTILATION, INC., a Michigan corporation,

Plaintiff,

vs. Case No. 2013-4587-CK

AMEREX ENVIORNMENTAL SERVICES, INC., a foreign Corporation, and AMEREX ENVIRONMENTAL TECHNOLOGIES, INC., a foreign corporation,

Defendants.

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OPINION AND ORDER

This matter is before the Court on Defendant Amerex Environmental Services, Inc.'s ("AES") motion for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10).

Background

Plaintiff Allied Ventilation, Inc. ("Allied") filed its complaint on November 15, 2013. Plaintiff's complaint alleges breach of contract and unjust enrichment based on Defendant Amerex Environmental Technologies, Inc.'s ("AET") and AES's failure to pay invoices totaling $728,926.00 for Plaintiff's duct installation work on a project termed the Mueller Brass project. Specifically, Plaintiff's claims seek to recover the $245,326.00 balance remaining on the invoices.

On or about December 17, 2013, Plaintiff obtained a default judgment against AET for its failure to answer or appear in this case. However, AET's assets were previously sold to another

company and then liquidated. As a result, Plaintiff seeks the remaining balance on the Mueller Brass project from AES, a project in which all three entities were involved.

The parties dispute the corporate relationship between AES and AET. It is undisputed that AET was a party to each purchase order contract for the Mueller Brass project. *See* Defendant's Motion, Exhibit A. Plaintiff submitted quotes for the Mueller Brass project to AES. *See* Plaintiff's Response at 6. Corporate officials of both AES and AET corresponding to Plaintiff failed to distinguish them as separate entities in documents and conversations and only referred to Amerex. *Id.*; *see* Exhibit 13, 14; Plaintiff's Supplemental Response at 4, Exhibit 1 at 32-34. AES and AET share the same: corporate address, CFO, President, employees, projects, website, letterhead, phone number, license agreement to use Amerex marks and name, accounts payable and accounts receivable departments; and each informally transfers hundreds of thousands of dollars to the other as needed without formal loan documentation, promissory notes, or interest charges. *See* Plaintiff's Response at 2; Plaintiff's Supplemental Response at 3-6.

With regard to the most recent procedural posture, Defendant AES filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) on May 12, 2014. On May 23, 2014, Plaintiff filed a response requesting that the motion be denied. On May 29, 2014, Defendant filed a reply brief and on July 7, 2014, Plaintiff filed a supplemental response to Defendant's[1] motion. On July 14, 2014 this Court heard oral arguments on Defendant's motion and took the matter under advisement. Subsequently, on July 17, 2014, Plaintiff requested leave to amend its complaint to include successor liability theory under a piercing of the corporate veil and alter ego corporation analysis. Plaintiff's request was in light of deposition testimony received on June 26, 2014 revealing the corporate relationship between AET and AES. This

[1] Because Plaintiff already has a default judgment against Defendant AET, Defendant AES will be referred to as "Defendant" in this Opinion and Order.

Court heard the parties' oral arguments on July 28, 2014 and granted Plaintiff's request to amend. Plaintiff filed its first amended complaint on July 30, 2014.

Standards of Review

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint to establish a claim upon which relief can be granted. *McCallister v Sun Valley Pools, Inc*, 100 Mich App 131; 298 NW2d 687 (1980). To support the legal sufficiency of a complaint, that is the causes of action it asserts, the factual allegations and reasonable inferences therefrom must be accepted as true to render review in favor of the nonmoving party. *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 696; 588 NW2d 715 (1995). Thus, the motion should be granted if "no factual development could possibly justify recovery." *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). Finally, when motions for summary disposition under MCR 2.116(C)(8) are considered in favor of the moving party, courts should freely grant leave to amend the complaint upon request and as "justice so requires." MCR 2.118(A)(2); *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Outdoor Sys Advertising v Korth*, 238 Mich App 664, 667; 607 NW2d 729 (1999). The court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted to determine whether a genuine issue of material fact exists to warrant a trial. *Id.* Consequently, if a genuine question of material fact remains, summary disposition is inappropriate. *Alyas v Gillard*, 180 Mich App 154; 446 NW2d 610 (1989). The court must also resolve all reasonable inferences in the nonmoving party's favor. *Outdoor Sys Advertising, supra* at 667.

Parties' Arguments

Defendant contends that since AET was the only defending party explicit to the purchase order contracts for the Mueller Brass project, it is not liable for the remaining balance owed to Plaintiff. In opposition, Plaintiff contends that the corporate relationship between AES and AET establishes each as an alter ego of the other, which allows a piercing of the corporate veil and contractual privity between the two.

Particularly, Plaintiff argues that all of the quotes on the Mueller Brass project and beginning documentation went to AES. Plaintiff maintains that this and other corporate mingling between AET and AES constituted a misrepresentation of AES's involvement with the Mueller Brass project. Moreover, Plaintiff argues that the CFO of both AET and AES could not answer how a third party contractor or customer would be able to distinguish AET and AES as separate entities. *See* Plaintiff's Supplemental Response at 3, Exhibit 1 at 78-79. In sum, Plaintiff argues that AES is liable because it is the alter ego of AET and that by piercing its corporate veil Plaintiff is entitled to relief on the remaining balance from the Mueller Brass project.

While conceding to the instrumentality prong to pierce the corporate veil at oral argument on the motions for summary disposition, Defendant argues that Plaintiff's complaint is procedurally deficient as it does not assert any fraudulent conduct. Specifically, Defendant contends that Plaintiff's complaint does not state factual allegations that sufficiently support the legal theory, alter ego/piercing the corporate veil, it now articulates.

Law

With regard to corporations, they are generally respected as separate entities, but may be treated as alter egos of each other in order to prevent injustice or fraud. *In re RCS Engineered Prods Co, Inc* 102 F3d 223, 226 (6th Cir 1996); *Wodogaza v H & R Terminals, Inc*, 161 Mich

App 746; 411 NW2d 848 (1987). The corporate veil that separates such two corporations may be pierced, and the two corporations are then alter egos of each other if "(1) [one] corporate entity was a mere instrumentality of [the other]; (2) the [particular] corporate entity was used to commit a fraud or wrong; and (3) the plaintiff suffered an unjust loss." *SCD Chem Distributors, Inc v Medley*, 203 Mich App 374, 381; 512 NW2d 86 (1994). When courts assess whether one corporate entity is a mere instrumentality of another, "each case is sui generis and must be decided in accordance with its own underlying facts." *Herman v Mobile Homes Corp*, 317 Mich 233, 243; 26 NW2d 757 (1947).

Principally, the piercing of the corporate veil liability theory is based in equity and it is "used to hold an entity liable when it uses a sham corporation to defraud a third party." *Addy Machinery Co v Vantage Industries, LLC*, unpublished opinion per curiam of the Court of Appeals, issued Nov 20, 2008 (Docket Nos. 279326, 280526).

Analysis

On the subject of the present procedural aspects of this case, the Court of Appeals has, pursuant to MCR 2.118, granted a plaintiff's request for leave to amend prior to ruling on a defendant's pending dispositive motion when "justice [has] so require[d]." *Dutton Partners, LLC v CMS Energy Corp*, 290 Mich App 635, 639; 802 NW2d 717 (2010); *see Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). In *Dutton*, the court upheld the trial court's decision with respect to maintaining, for summary disposition purposes, that a piercing of the corporate veil liability allegation in the amended complaint be treated as if it had been properly plead and raised before, although it was submitted during the interim of a motion for summary disposition. *Id.* At 642.

Similarly, in this case, Plaintiff was granted leave to amend its complaint during the interim of this Court's decision on Defendant's motion for summary disposition pursuant to MCR 2.116(C)(8). Plaintiff has added counts of successor liability and piercing of the corporate veil liability theories in its first amended complaint to support its alter ego corporation argument. *See* Plaintiff's First Amended Complaint at 8-9. Because summary disposition motions that propose a failure to state a claim require consideration of the non-movant's leave to amend the complaint, *see generally Phillips, supra* at 697, this Court will view Plaintiff's additional counts as properly plead when deciding Defendant's motions for summary disposition. Judicial efficiency purposes favorably support this viewing, rather than the alternative, that is, to have Defendant ultimately file a renewed motion for summary disposition.

Now comes the question of whether Plaintiff's first amended complaint sufficiently alleges a necessity to pierce the corporate veil in order to support that AET and AES are alter egos of each other and withstand Defendant's motion under MCR 2.116(C)(8). As stated above, Plaintiff must allege that one corporate entity was an instrumentality to the other, such that a fraud or wrong was done to Plaintiff and it thereby suffered an unjust loss. *SCD Chem Distrib, Inc, supra* at 381.

Foremost, for AET to serve as a mere instrumentality to AES in the purchase order contracts, rendering AES liable for the remainder owed, Plaintiff must prove that AES does not treat AET as a corporation separate from itself. *Florence Cement Co v Vettraino*, 292 Mich App 461; 807 NW2d 917 (2011). Under this fact intensive inquiry, some examples of included factors are whether the corporations share majority stock ownership, common directors and officers, a physical address, a website domain, in-house counsel, frequent interchanges of the same employees, or the notion that revenue of one entirely supports the other. *Maki v Copper Range*

Co, 121 Mich App 518, 524; 328 NW2d 430 (1982); *Dutton, supra* at 637-38; *see also Herman, supra* at 243. Plaintiff has presented many scenarios where the corporations have treated themselves as one entity. AES and AET share the same: corporate address, CFO, President, registered agent, website, letterhead, phone number, license agreement to use Amerex marks and name, accounts payable and accounts receivable departments, and employees who work in the same building but receive checks and insurance from either one of the two entities; and each entity informally transfers hundreds of thousands of dollars to the other as needed without formal loan documentation, promissory notes, or interest charges. *See* Plaintiff's Response at 2; Plaintiff's Supplemental Response at 3-6, Exhibit 1 at 9-10, 22-25, 29, 34-35. Many of the above factual depictions of the corporate relationship between AET and AES now incorporated into Plaintiff's first amended complaint are on point with examples from Court of Appeals decisions. Therefore, Plaintiff has made sufficient factual allegations to withstand summary disposition under both MCR 2.116(C)(8). The same is true for MCR 2.116 (C)(10) by way of demonstrating issues of material fact when Defendant argues that neither corporation served as an instrumentality to the other.

The second and third prongs in the piercing of the corporate veil liability theory require a finding that the subservient corporation was used to commit a fraud or wrong against the plaintiff, that results in an unjust loss. The Court of Appeals has opined that the second prong requires showing of either fraud or a *wrong*. *Addy, supra*; *see also Dutton, supra* at 644 (finding that a showing of misuse would suffice).

In *Addy*, the plaintiff was not paid for products it sold to the defendant corporation and alleged that the defendant served as an instrumentality to another corporation. *Id.* The plaintiff alleged misrepresentations of the defendant's financial stability to pay its obligation. *Id.* The

court noted that the plaintiff did not specifically plead fraud, however, the "conclusion [that the plaintiff was wronged for purposes of a motion for summary disposition under MCR 2.116(C)(8) with review in favor of the nonmoving party and prior discussion of a satisfied instrumentality prong to the inquiry, was] certainly natural because one must assume that Addy Machinery would not have sought relief unless it took the position that it had been subject to a wrong." *Id.* Equally, Plaintiff in this case alleges that neither corporation notified Plaintiff that its initial quotations and requests for payment directed to AES were sent to the wrong entity, nor that there were two separate entities. *See* Plaintiff's First Amended Complaint at 5. Consequently, and following Plaintiff's satisfactory factual demonstration of the instrumentality prong for summary disposition purposes, Plaintiff has alleged intentional misleading and that

> AES and AET engaged in the commingling of funds and other assets of the entities; the holding out by one entity that it is liable for the debts of the other; overlapping majority ownership of the entities; use of the same offices and employees; use of one as a mere shell or conduit for the affairs of the other; inadequate capitalization of AET; disregard of corporate formalities; and lack of segregation of corporate records … [which allowed them to engage] in business transactions resulting in existence of fraud, wrongdoing or injustice to third parties.

See Plaintiff's First Amended Complaint at 9-10.

Moreover, and with regard to the third prong of the piercing the corporate veil analysis, Plaintiff has alleged that it is owed $245,326.00 for the alleged wrong it suffered.

Comprehensively, Plaintiff's first amended complaint demonstrates well-plead factual allegations, presenting a piercing of the corporate veil liability theory supporting its alter ego argument, that withstand a motion for summary disposition under MCR 2.116(C)(8). Additionally, because Plaintiff has provided new issues of material fact with regard to the corporations' combined use of funding and other matters to support the above liability theories,

this Court finds Plaintiff has made sufficient showing to withstand a motion for summary disposition under MCR 2.116(C)(10) and need not address any further arguments.

Conclusion

For the reasons set forth above, Defendant's motion for summary disposition under MCR 2.116(C)(8) and MCR 2.116 (C)(10) is DENIED. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* neither resolves the last remaining issues nor closes this case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: August 25, 2014

JCF/sr

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